No. ~~935~~ 70-34

In the Supreme Court of the United States

OCTOBER TERM, 1970

SIERRA CLUB, PETITIONER

v.

WALTER J. HICKEL, INDIVIDUALLY, AND AS SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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CITATIONS

412-688—70——1

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1–28) is not yet reported. The opinion of the district court (Pet. App. B, pp. 29–42) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1970. The petition for a writ of certiorari was filed on November 6, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, a national conservation organization, has standing to challenge decisions of the Secretaries of Agriculture and Interior authorizing a recreation project and appurtenant facilities in a national forest and park.

2. Whether petitioner's claim that the Secretaries of Agriculture and Interior lacked statutory authority to authorize the recreation project and facilities had sufficient substance to justify a preliminary injunction.

STATUTES INVOLVED

The relevant portions of Section 1 of the Organic Administration Act of June 4, 1897, 30 Stat. 35, 16 U.S.C. 551; Sections 1 and 2 of the National Park Service Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. 1, 2; Section 1 of the Act of April 9, 1924, 43 Stat. 90, 16 U.S.C. 8; Section 2 of the Act of September 25, 1890, 26 Stat. 478, as amended, 16 U.S.C. 43; Section 3 of the Act of July 3, 1926, 44 Stat. 820, 16 U.S.C. 45c; the Act of March 4, 1915, 38 Stat. 1101, as amended, 70 Stat. 708, 16 U.S.C. 497; Sections 1 and 4 of the Multiple-Use Sustained-Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. 528, 531; Section 6 of the Act of July 3, 1926, 44 Stat. 821, as amended, 16 U.S.C. 688; and the Act of March 4, 1911, 36 Stat. 1253, as amended, 16 U.S.C. 5, are set forth as an appendix to this brief.

STATEMENT

Sequoia National Forest (including the Sequoia National Game Refuge, which is coextensive with the forest as to all forest lands in issue in this case) and the adjacent Sequoia National Park belong to the United States.

Congress has placed the administration of the Forest and Game Refuge in the Department of Agriculture and the administration of the Park in the Department of the Interior, to be exercised, respectively, under the direction of the Secretaries of Agriculture and Interior, subject to the provisions of 16 U.S.C. 1, 2, 5, 8, 497, 528, 531, 551 and 688. Additional restrictions are placed on the Secretary of the Interior with respect to the Park by the provisions of 16 U.S.C. 43 and 45c.

In February 1965, the Forest Service issued a prospectus inviting bids for development of a recreational project in Mineral King Valley in Sequoia National Forest and Game Refuge. In January 1969, the Forest Service chose the plan submitted by Walt Disney Productions, one of five bidders. The Disney plan involved an expenditure of about $35 million. Major facilities for up to 14,000 daily visitors (such as motels, restaurants, parking lots and swimming pools) were to be constructed on about 60 acres under a 30-year term permit. Auxiliary facilities, such as ski trails and lifts, would be constructed within a 13,000-acre area of the Forest and Game Refuge under a nonexclusive, revocable, special use permit. Clause 15 of the special use permit provides that it "may be terminated upon breach of any of the [numerous] conditions herein or at the discretion of the regional forester or the Chief, Forest Service." [1]

In connection with the project, the Department of the Interior proposed to issue a revocable permit to

[1] The 30-year term permit is not terminable at discretion, but may be terminated for breach of numerous specified conditions, including many designed to protect environmental values.

the State of California to improve and partially reroute an existing, substandard access road 9.2 miles across the adjacent Sequoia National Park and to grant a right-of-way for a 66,000-volt electrical transmission line through the park.

Sierra Club, declaring that it had a "special interest in the nature of the uses proposed in the Sierra Nevada Mountains on behalf of the general public," brought suit against both Secretaries and their subordinates, seeking to enjoin construction of the recreation project.

The complaint against Agriculture alleged that the Secretary's issuance of permits for the ski resort violated the Act establishing the National Game Refuge, 16 U.S.C. 688; exceeded the authority for recreational use and occupancy conferred by 16 U.S.C. 497 and 551; and violated the Forest Service's own regulations as to public hearings, 36 C.F.R. 211.20–211.119.

The complaint against Interior alleged that the plan to replace a 9.2-mile segment of an existing 20-mile route and the decision to permit construction of a transmission line across the park were illegal under the Act establishing the Park, 16 U.S.C. 41, 43, 45c.

The district court found that Sierra Club had standing as a plaintiff to seek injunctive relief because of its general interest in conservation matters. On the merits, it held that the Club had raised questions concerning possible excess of statutory authority "sufficiently substantial and serious to justify a preliminary injunction," which it granted against both Secretaries.

On appeal, the court of appeals reversed on both aspects of the district court's holding. With respect to

standing, the majority found that the Club's asserted interest, as stated in its complaint, was entirely abstract, and hence insufficient to support the litigation. On the merits, the court was unanimous that no sufficient showing had been made to warrant the district court's granting of preliminary relief. On the basis of an established practice of combining term and revocable permits to create ski areas, it found no substantial reason for doubting the authority of the Secretary of Agriculture to issue those permits. Regarding the challenged actions of the Secretary of the Interior, the court stated (Pet. App. 24): "We know of no law and find little logic in a contention that a twisting, substandard, inadequate road through 9.2 miles of the park is legal but that an improved all weather two lane highway along a new but approximately parallel alignment is illegal." Nor did the court find it likely that the Club could prevail in its contention that the Secretary of the Interior was not authorized to grant permits for a transmission line right-of-way. Finally, the court found no substance to the argument that the project would interfere with the Game Refuge.

ARGUMENT

1. The question whether the Sierra Club, on its complaint as drafted, has alleged facts sufficient to show standing to bring this action does not warrant review in this Court. That holding is a narrow one, simply that the Sierra Club has not alleged sufficient facts to show that it or its members would be concretely injured or aggrieved by the proposed administrative

action—in other words, that there has been no "injury in fact," as required to establish standing under this Court's cases. *Data Processing Service* v. *Camp*, 397 U.S. 150, 152. Even if such a conclusion were in error, it is in the nature of a finding of fact, of the sort which this Court has frequently indicated does not warrant exercise of its certiorari jurisdiction.

Moreover, the standing issue here is not dispositive. The court of appeals carefully considered and resolved the merits of the dispute. To paraphrase the remarks of *amici* The Wilderness Society *et al.*, Br. at p. 4, n. 1, even if the Ninth Circuit is wrong, and national conservation organizations do have standing on the basis of such bare-bones allegations as were made in this case, this will affect only one holding, not the decision, of the court of appeals.

Finally, the asserted conflict among the circuits over the standing issue is not of such magnitude as to override this consideration. This Court has already indicated as much by its recent denial of certiorari in a petition raising the other side of the "conflict," *Parker* v. *Citizens Committee*, No. 614, this Term, certiorari denied, December 7, 1970. In its parallel petition, *Volpe* v. *Citizens Committee*, No. 615, this Term, denied the same day, the government did not raise the standing question asserted by New York State in *Parker*. Any disagreement between the circuits on that issue seemed too oriented to the facts of particular cases, and too close to this Court's recent

decisions in *Data Processing Service* and other like cases, to warrant the assertion that it was of an importance which required this Court's attention. We persevere in that view today. Of course, should the Court find review of the substantive issues raised in the petition warranted, the asserted issue of standing would also be appropriate for review. But of itself, in the circumstances of this case, it does not warrant the Court's attention.

2. The issues which go to the heart of the proposed development are those which concern the actions of the Secretary of Agriculture in administering the Sequoia National Forest and Game Refuge. These are, first, the contention that it is illegal for the Secretary to conjoin term and revocable permits in authorizing the creation of a ski area on national forest lands; and, second, that creation of a ski area is necessarily inconsistent with the congressionally required use of these lands as a game refuge. As to each, the court of appeals correctly concluded that the petitioner had shown "neither a reasonable certainty that it will prevail nor irreparable injury." Pet. App. 18.[2]

[2] Petitioner claims that this is too stringent a test for the granting of preliminary injunctive relief, and in conflict with the decisions of another circuit. But in emphasizing a portion of the quoted passage from *Unicon Management Corp.* v. *Koppers Company*, 366 F. 2d 199 (C.A. 2), Pet. at 19, petitioner acknowledges the correctness of a rule that one or the other of these factors—reasonable certainty and irreparable injury—must exist. The finding of the court of appeals was that *neither*

Any challenge to the Secretary's authority must overcome Congress' plenary power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Const. Art. IV Sec. 3. *Gibson* v. *Chouteau,* 13 Wall. 92, 99; *Alabama* v. *Texas,* 347 U.S.C. 272, 273–274. This power is delegable and has here been delegated to the Secretaries of Agriculture and Interior. *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 336–338; *Boesche* v. *Udall,* 373 U.S. 472, 476; *United States* v. *Grimaud,* 220 U.S. 506.

Congress has authorized the Secretary of Agriculture "to regulate [the] occupancy and use" of national forests. 16 U.S.C. 551. The Multiple-Use Sustained Yield Act of 1960 directs him to accomplish this by balancing many potential uses of national forest lands: outdoor recreation, range, timber, watershed and wildlife and fish purposes. 16 U.S.C. 528. He is authorized to issue 30-year leases for up to 80 acres

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had been shown, and that therefore preliminary relief was not proper.

Nor is the question of "irreparable injury" answered by showing that there may be certain irreversible impacts on the environment or, more properly, particular features of it. The injury which must be demonstrated is injury *to the plaintiff,* which tips the balance of hardship decidedly toward him. *Ibid.* But, as the court of appeals held in relation to the issue of standing, petitioner thus far has succeeded in showing no more than an abstract affront to its interests; the other side of the balance of hardship is represented by the more than 100,000 skiers and others whose interests are being frustrated, and the Secretaries of Agriculture and Interior, whose administration of federal lands on behalf of all citizens is being impeded. The court was correct in concluding that no "irreparable injury" had been shown.

of national forest to be used for "hotels, resorts and any other structures or facilities necessary or desireable for recreation." 16 U.S.C. 497. And he has, in addition, power to permit the use of larger areas of the public domain through nonexclusive, revocable special use permits for such purposes as ski slopes and attendant equipment, so long as that is consistent with national forest purposes. 16 U.S.C. 551.

This last power, in particular, is sustained by long and recognized administrative practice. As the court of appeals noted (Pet. App. 22), there are at least eighty-four recreational developments on national forest lands which combine use of a fixed-term lease for lands on which permanent structures are erected and revocable permits for surrounding lands used for recreation consistent with national forest purposes.[3] That practice is known to Congress, which recognized that the Secretary "now has adequate authority to issue revocable permits for all purposes under the Act of June 4, 1897 (16 U.S.C. 551)," H. Rep. No. 2792, 84th Cong. (1956) 2d Sess. p. 2 [1956] U.S. Code Cong. and Admn. News, p. 3635], when it enlarged

[3] Some recreation projects, the court noted, exceeded 6,000 acres. The Forest Service has, since 1908, authorized issuance of revocable special use permits for such uses as residences, farms, dairies, schools, churches, telephone and telegraph lines, stores, saw mills, factories, hotels, summer resorts, dams, reservoirs, water conduits and power lines. Many of such structures were costly. The Forest Service has granted approximately 62,000 revocable permits authorizing 80 different uses of national forest lands. Management Policy and Other Problems of the National Forests, Hearings before the Subcommittee on Forests of the Committee on Agriculture, House of Representatives, 90th Cong., 1st Sess. (June 13–16, 1967), pp. 2–4.

from five to eighty acres the limit on land leasable for a fixed term and for permanent structures. In this context, surely, the court of appeals was correct in finding it unlikely that the plaintiff would succeed. *Udall* v. *Tallman*, 380 U.S. 1, 16.

The Secretary's broad discretion to administer the public lands is, in itself, an indication that his actions are entitled to deference. "* * * [W]here the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion * * *. We then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision." *Panama Canal Co.* v. *Grace Line Inc.*, 356 U.S. 309, 318; see, also, *Boesche* v. *Udall*, 373 U.S. 472, 486; *Thompson* v. *Consolidated Gas Co.*, 300 U.S. 55, 69; *McMichael* v. *United States*, 355 F. 2d 283 (C.A. 9). Here, the court of appeals was able to assure itself that the Secretary had shown "evidence of great concern for the ecology of the area and the preservation and conservation of natural beauty and environmental features. * * *" Pet. App. 23. Once it appeared clear that the Secretary was not acting in breach of some plain duty, it followed that preliminary injunctive relief would be improper.

Finally, the legislation designating Sequoia National Forest a game refuge, 16 U.S.C. 688, does not segregate it from other national forests as a place where, in particular, a ski resort or other recreational enterprise may not be authorized. The legislation spe-

cifically states that nothing contained in it "shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established." As has already been noted, the Secretary carried out this obligation by the insertion of conditions on both the 30-year fixed term lease and the revocable special use permit to assure that animal habitat and game would be protected. Petitioner asserts that no formal "finding" has been made that this use is consistent with the game refuge. But the statute requires no administrative proceeding, and so the action of the Secretary in authorizing the project, on stated conditions which reflect concern for the ecology of the area, must be taken as embodying any necessary finding. *Thompson* v. *Consolidated Gas Co., supra.* The holding of the court of appeals, correct on this record and a matter which would not ordinarily warrant review in this Court, was that petitioner had not shown a likelihood of prevailing in showing that that implicit finding was in error.

3. The challenges to the authority of the Secretary of the Interior arise from the need to use the Sequoia National Forest as an access route, both by road and for necessary power, to the Mineral King Development. These challenges do not go to the project itself; but if petitioner could block road access to the project, or the supply of electrical power, it is evident that the project would be severely inhibited. The case in this respect perhaps resembles the situation in *Parker* v. *Citizens Committee* and *Volpe* v. *Citizens Committee,*

supra. There, too, citizen groups sought to block a major development project on essentially technical grounds. In that case, they were able to persuade the court of appeals that their view of what the statutes required was correct, and it followed that the road project in question could not be authorized until those requirements were met. This Court found that question of statutory construction insufficient to warrant review, although a major project turned on it. Here, too, the statutory questions are of relatively minor import, although a substantial development could be blocked if petitioner's view of them were adopted. Petitioner failed to convince the court that its view was so likely to prevail as to warrant the granting of preliminary relief. That outcome raises no question of an importance warranting review in this Court.

Regarding the proposed improvement of highway access to Mineral King, petitioner's position is, essentially, that the Secretary of the Interior has no authority to permit construction of roads for transportation through, as distinct from "within" or "around," a national park. While the Department itself discourages such roads, neither the Department's policy nor the statute forbids them.[4] What both require is

[4] Section 4(f) of the Department of Transportation Act, as amended, 82 Stat. 824, 49 U.S.C. (Supp. V) 1653(f), and Section 138 of the Federal-Aid Highway Act, 23 U.S.C. (Supp. V) 138, which are before this Court in *Citizens to Preserve Overton Park* v. *Volpe*, No. 1066, this Term, are not applicable in this case, and petitioner does not rely upon them. The proposed highway through the park will be built using only state funds, and in no respect comes within the authority of the Secretary of Transportation. The authority of the Secretary of the Interior to construct roads and trails in national parks is conferred by 16 U.S.C. 8.

that any road be constructed in a manner which will "conserve the scenery and the natural and historic objects and the wild life therein" and "leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1. The court of appeals found the proceedings in this case insufficient to establish a probability that the road would not be so constructed. It remains open to petitioner, if it can establish its standing, to show that the road will, in fact, be contrary to the statutory standard. The issues presented, essentially factual, involve no matters of the importance required by this Court's rules.[5]

Unquestionably, a different conclusion would have to be reached had the departmental regulations adopted in the last days of an outgoing administration not been revoked. As petitioner points out, those regulations would have required public hearings of a kind which have not been held. The contention that the procedural requirements were not revoked, however, is frivolous; and as the court of appeals pointed out, the public in fact had opportunities to be heard on the road and its design even before those requirements were adopted.

Finally, the question whether the proposed electric facilities were "transmission lines" requiring congressional approval under 16 U.S.C. 45c does not require review in this Court. Like the question whether certain roadworks in the Hudson River would be "dikes" or "causeways," the meaning for which petitioner

[5] A further factor is that the road in question is designed to replace an existing, inadequate facility, rather than to initiate road contact between two points.

contends is a possible one. But the meaning adopted by the court—that the Section applies only to the construction and development of hydroelectric facilities—is more convincing in view of both the Section's history, set out in the Brief *Amicus Curiae* of the County of Tulare, pp. 16–18, and the existence of 16 U.S.C. 5, which permits granting rights of way through national parks generally for the transmission of electrical power. Section 45c, in any event, has no application outside the Sequoia National Park. The issue how it should be construed, presented here at a preliminary stage, lacks the importance required for review in this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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DECEMBER 1970.

APPENDIX

STATUTES INVOLVED

Section 1 of the Organic Administration Act of June 4, 1897, 30 Stat. 35, 16 U.S.C. 551, reads in pertinent part as follows:

> The Secretary of Agriculture * * * may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; * * *.

Sections 1 and 2 of the National Park Service Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. 1, 2, read in pertinent part as follows:

> There is created in the Department of the Interior a service to be called the national Park Service, * * *. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified * * * by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.
>
> * * * In the supervision, management, and control of national monuments contiguous to national forests the Secretary of Agriculture may cooperate with said National Park Service to such extent as may be requested by the Secretary of the Interior.

Section 1 of the Act of April 9, 1924, 43 Stat. 90, 16 U.S.C. 8, provides:

> The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct, and improve roads and trails, inclusive of necessary bridges, in the national parks and monuments under the jurisdiction of the Department of the Interior.

Section 2 of the Act of September 25, 1890, 26 Stat. 478, as amended, 16 U.S.C 43, provides, in relevant part:

> Sequoia National Park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury of all timber, mineral deposits, natural curiosities or wonders within said park, and their retention in their natural condition. * * *

Section 3 of the Act of July 3, 1926, 44 Stat. 820, 16 U.S.C. 45c, provides:

> Nothing contained in section 45a or 45b of this title shall affect any valid existing claim, location, or entry established prior to July 3, 1926, under the land laws of the United States, whether for homestead, mineral, right-of-way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land: *Provided,* That under rules and regulations to be prescribed by him the Secretary of the Interior may issue permits to any bona fide claimant, entryman, landowner, or lessee of land within the boundaries established by sections 45a–45e of this title to secure timber for use on and for the improvement of his land; and he shall also have authority to issue, under

rules and regulations to be prescribed by him, grazing permits and authorize the grazing of livestock on the lands within said park at fees not to exceed those charged by the Forest Service on adjacent areas, so long as such timber cutting and grazing are not detrimental to the primary purpose for which such park is created: *Provided,* That no permit, license, lease or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress.

The Act of March 4, 1915, 38 Stat. 1101, as amended, 70 Stat. 708, 16 U.S.C. 497, reads in relevant part as follows:

> The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety; * * *.

Sections 1 and 4 of the Multiple-Use Sustained-Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. 528, 531, read in pertinent part as follows:

> It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528–531 of this title are declared to be supplemental to, but not in deroga-

tion of, the purposes for which the national forests were established as set forth in section 475 of this title [Act of June 4, 1897, 16 U.S.C. 475]. * * *

* * * * *

As used in sections 528–531 of this title, the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

Section 6 of the Act of July 3, 1926, 44 Stat. 821, as amended, 16 U.S.C. 688, reads in pertinent part as follows:

All parts of township 17 south, ranges 31 and 32 east, and township 18 south, range 31 east, Mount Diablo base and meridian, which are north of the hydrographic divide passing through Farewell Gap, and which are not added to and made part of the Sequoia National Park by the provisions of 688–689d of this title, are designated as the Sequoia National Game Refuge, and the hunting, trapping, killing, or capturing of birds and game or other wild animals upon the lands of the United

States within the limits of the said area shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture; * * * and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and the rules and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established.

The Act of March 4, 1911, 36 Stat. 1253, as amended, 16 U.S.C. 5, reads in pertinent part:

> The head of the department [of the Interior] * * * be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way * * * over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power * * *.

U.S. GOVERNMENT PRINTING OFFICE: 1970